

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 64216-2-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
DARRELL GREGORY JONES,)	UNPUBLISHED OPINION
)	
<u>Appellant.</u>)	FILED: July 26, 2010

Lau, J. — Darrell Jones appeals his conviction for unlawful possession of a controlled substance—phencyclidine (PCP). He argues that the trial court erred by denying his motion for a continuance to secure the testimony of an exculpatory witness and insufficient evidence supports his conviction. We affirm.

FACTS

The State charged Darrell Jones with unlawful possession of a controlled substance—PCP. At trial, Jones testified in his own defense. According to Jones, on November 25, 2008, he and his girl friend, Ola Milam, went to the Beacon Hill home of their friend, Deshawn Mitchell. Jones, Milam, Mitchell, and one other person¹ began drinking tequila and finished one bottle and a portion of a second one. Later, Milam

¹ Jones testified that, in addition to himself, “three other people” were drinking tequila with him. RP at 149.

gave Jones a ride to his mother's home in the Central District. Jones claimed that because he did not have a jacket to wear, he asked Mitchell if he could borrow one of his.

After Jones was dropped off in the Central District, Officer Losleben stopped him because he fit the description of an assault suspect. Although the victim positively identified Jones, the State later dismissed the assault charge for lack of evidence. Officer Nicholas Kartes searched Jones incident to arrest. He discovered in Jones's jacket pocket a small, brown bottle containing a yellow substance that field tested positive for PCP. Forensic scientist Steven Reid testified that he identified the liquid as PCP using two separate laboratory tests.

After his direct examination, Jones requested a continuance² so that his attorney could attempt to secure Mitchell as a witness. Jones's attorney then stated that he learned about Mitchell as a potential witness just before Jones took the stand and that he had tried to contact him at the King County jail the day before, but that he "would not come out." II Verbatim Report of Proceedings (June 24, 2009) (RP) at 144–45.

Jones's attorney stated, "I don't know . . . what Mr. Mitchell would say." RP at 145.

The trial court denied the motion for a continuance ruling.

If there—if—interpreting that as some motion to stop the trial to go find this witness, I would deny the motion at this time, given the attorney made efforts yesterday to talk to this witness, the witness would not come out and speak with him. Also, there would be a—from the facts that were testified to yesterday, there would be a Fifth Amendment right for Mr. Mitchell—I mean if the testimony

² Jones stated, through his attorney, that "he would like, in essence, the trial stopped . . . to try to contact a particular witness [who] may be beneficial to the case." RP at 144.

of the defendant is to be believed, and it's Mr. Mitchell's jacket and the drugs were found in the jacket, then Mr. Mitchell, you know, would have a Fifth Amendment right not to testify, so—and I'd have to assign him counsel to discuss that fact, so I am denying the motion at this time.

RP at 146.

The jury was instructed on the affirmative defense of unwitting possession as requested by Jones. The jury convicted Jones of unlawful possession of PCP.

ANALYSIS

Motion for Continuance

Jones first argues that the trial court erred by denying his motion for a continuance to secure Mitchell's testimony. The State responds that the trial court did not abuse its discretion by denying Jones's motion.

"[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court."³ State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). "We will not disturb the trial court's decision unless the appellant or petitioner makes 'a clear showing . . . [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'"

Downing, 151 Wn.2d at 272–73 (alteration in original) (quoting State ex. rel. Carroll v.

³ Jones argues that denial of a continuance involves constitutional error, which the State must show was harmless beyond a reasonable doubt. But Jones relies on cases dealing not with continuances, but with circumstances where the defendant was denied the use of witnesses who were present and willing to give material testimony. See State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996) (holding that the defendant's right to compulsory process was violated when the trial court excluded a duly subpoenaed witness from testifying despite having relevant exculpatory evidence); State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976) (holding that the State's use of an inquiry procedure during a pending trial, which denied the defendant access to his witnesses, violated the defendant's right to compulsory process). The rule is well settled that we review a trial court's decision as to whether to grant a continuance for an abuse of discretion.

Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). “In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure.” Downing, 151 Wn.2d at 273, 87 P.3d 1169. A decision is manifestly unreasonable if the court decides the issues in a way that no other reasonable person would do. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

Here, Jones made no showing that a continuance would have secured Mitchell’s attendance at trial. Mitchell refused defense counsel’s request to interview him the day before the motion. And defense counsel conceded he did not know what Mitchell would say if he did testify. Finally, Jones cannot show that Mitchell would have waived any claimed Fifth Amendment privilege and testified favorably to Jones.

The court indicated that it denied the motion because Mitchell declined to talk to defense counsel and because he had a Fifth Amendment privilege.

I would deny the motion at this time, given the attorney made efforts yesterday to talk to this witness, the witness would not come out and speak with him. . . . Mr. Mitchell, you know, would have a Fifth Amendment right not to testify, so—and I’d have to assign him counsel to discuss that fact, so I am denying the motion at this time.

RP at 146. Jones asserts that such a concern was somehow improper, stating, “The court’s concern with waiting for additional witnesses or needing to seek assigned counsel ignores its obligation of ensuring that Mr. Jones’s constitutional rights were protected.” Br. of Appellant at 9. The trial court’s need to adhere to its trial schedule is a legitimate factor to be considered when deciding whether to grant or deny a continuance. See State v. Chichester, 141 Wn. App. 446, 454, 170 P.3d 583 (2007) (denial of continuance was not abuse of

discretion as court could consider “orderly procedure in the setting of trials” and prefer maintaining a confirmed trial setting over prosecutor’s scheduling conflicts); see also State v. Edwards, 68 Wn.2d 246, 257, 412 P.2d 747 (1966). That is particularly true here given that Jones made the continuance motion near the close of all the evidence. And the record shows that Jones knew well before trial about the facts constituting his unwitting possession defense—the borrowed jacket he wore when arrested and searched belonged to Mitchell. Because the trial court’s decision rested on tenable grounds and reasons for denying the continuance, it did not abuse its discretion.

Unwitting Possession Defense

Jones next argues, “[T]he State failed to prove that Mr. Jones was in knowing possession of a controlled substance. Because no rational trier of fact could eliminate all reasonable doubt, Mr. Jones’s conviction must be reversed and dismissed.” Br. of Appellant at 16.

The law of unwitting possession is well settled. George, 146 Wn. App. at 914–15. “The State has the burden of proving the elements of unlawful possession of a controlled substance as defined in the statute—the nature of the substance and the fact of possession.” State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). But in its prima facie case, “[t]he State is not required to prove either knowledge or intent to possess, nor knowledge as to the nature of the substance in a charge of simple possession.” State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). But “[d]efendants . . . can prove the affirmative defense of unwitting possession.” George, 146 Wn. App. at 914–15. Thus, “[a]side from the unwitting possession defense,

possession is a strict liability crime.” State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). Accordingly, we reject Jones’s contention.

Here, Jones’s defense—that he did not know the PCP was in the borrowed jacket—relied solely on his own testimony and therefore depended on his credibility.

Indeed, the State highlighted the credibility issue in closing, stating,

This defendant did not have to take the stand, but once he did, he becomes subject to the same credibility factors that you would use in weighing the testimony of any other witness who takes the stand. . . .

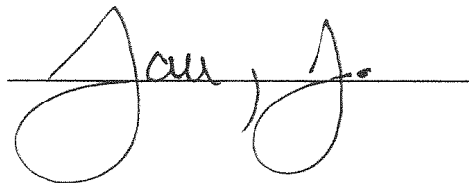
. . . .
Now, one of those factors is any personal interest a witness might have in the outcome of the case. . . .

. . . . He’s caught red-handed in this case. Of course he has a witness—or a personal interest in trying to explain away everything he can about this incident.

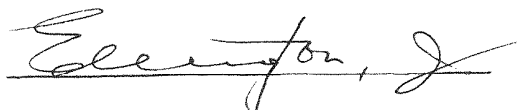
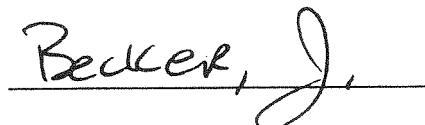
RP at 171–73.

We defer to the fact finder’s credibility determinations as they are “within the sole province of the jury and are not subject to review.” State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Given the jurors’ opportunity to assess witness demeanor and credibility, we will not disturb their finding. See State v. Pierce, 134 Wn. App. 763, 774, 142 P.3d 610 (2006).

We affirm Jones’s conviction.

A handwritten signature in cursive script, appearing to read "Jones", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Eremington", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Becker", written over a horizontal line.

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